Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JAMES S. LINTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

May a United States Court of Appeals for the Seventh Circuit in an unpublished decision summarily affirm a district court's factual finding regarding the consensual nature of a search without engaging in a weighing of the factors discussed in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)?

PARTIES IN COURT BELOW

Other than the present Petitioner and Respondent, there were no parties to the proceedings in the Seventh Circuit Court of Appeals whose judgment is sought to be reviewed.

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OPINION BELOW

The decision of the Court of Appeals for the Seventh Circuit affirming the conviction is an unpublished decision issued in Order form. That decision is reprinted at Appendix A (App. 1a-2a) to this petition along with the Magistrate's recommendation (App. 3a-14a) and the District Court's Order adopting the Recommendation (App. 15a-18a).

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was entered October 20, 1994. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254.

CONSTITUTIONAL PROVISIONS

This petition concerns the application of the Fourth Amendment to the United States Constitution which provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

(i) Nature of the Case

This is an appeal from a criminal conviction and sentence obtained by the government against the appellant following a conditional plea of guilty pursuant to Rule 11(a) of the Federal Rules of Criminal Procedure, Honorable Thomas J. Curran, presiding. (Doc. 48; Doc. 59) Per the terms of a written plea agreement, the plea is conditional because the defendant preserves, for appellate re-

view, the denial of the pretrial motion to suppress evidence seized from the defendant's residence on 8/5/93. (Doc. 45).

(ii) Course of Proceedings

On August 10, 1993, a One Count Indictment with forfeiture provisions was returned by the Grand Jury in the Eastern District of Wisconsin charging James S. Linton with possession with intent to distribute a mixture containing cocaine base. The offense was said to have occurred on or about August 5, 1993. (Doc. 5). The defendant filed Motions to Suppress Evidence. The first Motion to Suppress Evidence, filed on August 19, 1993, argued for suppression of evidence on the grounds that the search of defendant's residence was without a warrant and without consent. (Doc. 7). The second Motion to Suppress Evidence, filed on September 3, 1993, argued for suppression on the grounds that the defendant was arrested without a warrant and without probable cause in his home, and requested suppression of all evidence as "fruit" of the unlawful arrest. (Doc. 17). This second motion also adopted and incorporated the arguments and grounds set forth in the previously filed final statement of facts, first Motion to Suppress, affidavits in support thereof, and memorandum of law. The second motion explained that it was filed to raise further grounds for suppression besides the warrantless search (*Id.*) On October 5, 1993, an evidentiary hearing was held on defendant's Motion to Suppress Evidence. (Doc. 31; Doc. 33). On November 19, 1993, Magistrate Judge Robert L. Bittner issued a Recommendation to Judge Curran that the Motion to Suppress be denied. (Doc. 41; App. 3a-14a). The defendant timely filed Objections Regarding the Magistrate Judge's Recommendation on Suppression Issues on November 29, 1993. (Doc.

42). On January 5, 1994, Judge Thomas J. Curran issued an Order affirming the Magistrate Judge's Recommendations and denying the Defendant's Motion to Suppress. (Doc. 47; App. 15a-18a).

On January 10, 1994, the defendant entered a conditional plea of guilty to the one count in the indictment, pursuant to Rule 11(a) of the Federal Rules of Criminal Procedure, preserving for appellate review, the denial of the pretrial motion to suppress evidence seized from the defendant's dwelling on August 5, 1993. (Doc. 48; Doc. 59).

On April 6, 1994, Mr. Linton was sentenced to a term of 140 months. Upon release from imprisonment, the defendant shall be on supervised release for a term of 4 years. Fine of $1500.00 was also imposed. The interest requirement on the fine is waived. It was also ordered that the defendant shall pay a special assessment of $50.00 for counts one. (Doc. 52; Doc. 51; Doc. 58). The defendant was also ordered to forfeit $20,391.00 as stated in the Indictment. (Doc. 52; Doc. 51; Doc. 58) Defendant timely filed his notice of appeal to this Court on April 6, 1994 (Doc. 54). An amended notice of appeal was filed on April 8, 1994 (Doc. 55), and the jurisdictional statement required by Circuit Rules 3(c) and 28(b) (7th Cir.) on April 6, 1994. (Doc. 56).

(iii) Disposition in Court Below

Mr. Linton was convicted, and he was sentenced to imprisonment. The sentence has been executed, and appellant is incarcerated at a Federal Correctional Institution. By an unpublished decision dated October 20, 1994, the Court of Appeals for the Seventh Circuit affirmed Mr. Linton's conviction and sentence (App. 1a-2a). *United States v. James Linton*, 94-2061 (October 20, 1994).

Mr. Linton is presently confined in a Federal Correctional Institution located in Terre Haute, Indiana.

A. The Police Version of Events

Officer Lindsay's account

Officer Ronald Lindsay was the first witness to testify, and related the following. On August 5, 1993, police officers, Ronald Lindsay and Ken Corbett, received a report over dispatch at approximately 12:11 a.m. of a reckless endangerment of safety involving a shotgun. Eventually Officer Lindsay spoke to a complaining citizen witness, Oden Ferreiz. (Doc. 33; Tr. Evid. Hrg. (10-5-93) at 7 and 28).

According to Mr. Ferreiz, while visiting relatives at the 2800 block of North 15th Street, a person by the name of Junior fired a shotgun at him. *Id.* at 8, 9. Mr. Ferriez was a stranger to Officer Lindsay, and Mr. Ferriez's character for truthfulness was unknown. *Id.* at 17. When police went to the flat at 2810A North 15th Street, police officers only had the word of Mr. Ferriez. No gun or physical evidence corroborated his account. *Id.* at 24. Mr. Ferriez only provided a general clothing description of the suspect named Junior. *Id.* at 25. Mr. Ferriez did not know the address of the suspect, but only the location of the residence which he pointed out to the officers. *Id.* at 9. The police escorted Mr. Ferriez back to the scene. *Id.* at 23.

Police officers then went to the flat at 2810A North 15th Street. *Id.* at 10. In order to get to this flat, they had to go up a flight of stairs, on the south side of the building. Three officers accompanied Officer Lindsay up the stairs. *Id.* at 28. The police were armed. *Id.* at 29. Officer Lindsay was carrying a .9 millimeter Sigsauer, side

arm. *Id.* at 27. Officer Lindsay was accompanied by Officers Dave Arndt and Bob Connolly. *Id.* at 27. Also present were Officers Michael Hartert and Mark Apreisnig. (Doc. 33; Tr. Evid. Hrg. at 28). Officer Arndt had a Remington pump action shot gun. *Id.* Police Officers knocked on the door of the flat, and a black female answered the door. She was advised that the police were conducting an investigation of the offense, and asked if a Junior lived there. She answered yes. According to Officer Lindsay, a few moments later, after the female had called out to someone in the rear of the residence, Mr. James Linton appeared. (Doc. 33; Tr. Evid. Hrg. at 11).

Police explained to Mr. Linton that they were investigating a weapons-related offense. The complainant was outside. Police wanted Mr. Linton to get dressed and come outside with them to be identified or to be looked at by a complainant. *Id.* at 12 and 13. On cross-examination, Officer Lindsay explained that he placed handcuffs on Mr. Linton while Mr. Linton was still in the residence, and that Mr. Linton was not simply free to just walk away from all of this. *Id.* at 32. Mr. Ferriez was waiting in a squad car parked on the corner of Center and 15th Street. *Id.* at 12 and 13.

At this point, Officer Lindsay also claimed that he asked Mr. Linton for permission to look for a shotgun, and that Mr. Linton consented. The officer interpreted a brief exchange as consent. *Id.* at 13. Officer Lindsay conceded on cross-examination that during his exchange with Mr. Linton that Mr. Linton became agitated, and that there is no indication in his report of the dialogue that the Officer construed as consent. Although this report was filled out when the events were fresh in the officers mind, the report does not identify who gave consent to search, when it was given, and how it was manifested. *Id.* at 30. Of-

ficer Lindsay never asked either Mr. Linton or Ms. Linton for written consent to search the dwelling. (Doc. 33: Tr. Evid. Hrg. at 28).

According to Officer Lindsay, Ms. Linton brought the defendant clothes, and these clothes matched the description given of the suspect. *Id.* at 13. Mr. Linton was taken downstairs and outside in the front of the residence where Mr. Ferriez observed him from a squad car. At this time, a positive identification was made by Mr. Ferriez that Mr. Linton was the subject involved in this shooting offense. *Id.* at 15. At this point, according to Officer Lindsay, Mr. Linton was informed that he was under arrest. *Id.* at 15.

Officer Lindsay claims that the cabinets in the kitchen would have been able to house a shotgun or rifle, and that he observed cocaine base there. *Id.* at 16. Yet on cross-examination, he backtracks and concedes that he did not personally look in any cabinets and did not personally search in any rooms of the dwelling. *Id.* at 32.

In terms of corroboration of Mr. Ferriez's story that night, the police, prior to taking Mr. Linton into custody, apparently engaged in no effort to corroborate Mr. Ferriez's account. For instance, initially Officer Lindsay claimed on direct examination that he observed a '86 Ford Escort GT, two door, no plates, with drivers side windows appearing to be shot out and that this corroborated Mr. Ferriez's tale of gunplay. *Id.* at 10.

However, later on cross-examination, he conceded the following as to the Ford Escort. He does not know whether he saw this car before or after Mr. Linton was taken into custody. *Id.* at 22. He spotted the car when he approached the scene; other cars had bullet holes in them in the area, but he did not feel that this was germane to the incident. (Doc. 33; Tr. Evid. Hrg. at 23). He saw the automobile

with the windows shot out after Mr. Linton's arrest and after his transport downtown. *Id.* at 22. No recollection of whether he even asked Mr. Ferriez if this Ford Escort had been shot out during this incident. *Id.* at 23. In his report filed on this case, there is no mention of a Ford Escort with windows shot out as having anything to do with this case. *Id.* at 23.

And finally, Officer Lindsay agreed that in light of the high incidence of gunshots and the high incidence of cars with bullet holes in them in this area, he could not say that those particular cars observed on August 5, 1993 had anything to do with the incident which Mr. Ferriez described. *Id.* at 24. Thus casting into doubt, the believability of his earlier claim that the Ford Escort with shot out windows corroborated Mr. Ferriez's account.

This officer also conceded that he was familiar with the telephonic warrant procedure under Section 968.12, Wis. Stats.. Nevertheless he did not apply to any judge for an arrest warrant or search warrant for anyone's arrest when he went to the residence at 2810A North 15th Street. *Id.* at 26.

Officer Michael Hartert's account

Milwaukee Police Officer Michael Hartert was the second officer called by the government at the suppression hearing. This officer spent two hours in the flat that evening. *Id.* at 49. He was armed with a Sigsauer, 9 millimeter handgun. He couldn't remember whether he had it drawn and out of holster while in the apartment, but confirmed that the gun was out of its holster when he was outside the apartment. (Doc. 33; Tr. Evid. Hrg. at 55). He later on cross-examination speculated that he might not have had it out of its holster while in the apartment

because he simply "didn't perceive a threat" since Mr. Linton was conversing with other officers. *Id.* But this is speculation and only speculation.

At the outset of his testimony, he paints a picture of his efforts to convince a silent Ms. Linton to consent to a wholesale search of her dwelling. *Id.* at 38. He explained to her that she wouldn't want young children to find the gun. *Id.* According to Officer Hartert, Ms. Linton eventually said, "(G)o ahead." *Id.*

As to the consent to search, Officer Hartert failed to ask Ms. Linton for any type of written consent or any type of written statement. *Id.* at 50. He along with other officers searched three rooms of the dwelling, but failed to ask for permission before he entered and searched each room. *Id.* Nor is there any indication in the record that he attempted to determine or clarify the scope of the alleged consent. He just relied on what he termed to be the "original consent to search". *Id.* (Which can only be described at best as a vague discussion without any clear consent by Ms. Linton for the police to do anything in her dwelling). During the search, Officer Hartert recovered cocaine base, materials for packaging and manufacture of the cocaine base, and large sums of cash. *Id.* at 49 and 51.

In other respects, the trustworthiness of his testimony suffers as well. For instance, he declared emphatically that he was advised by Ms. Linton that she was the wife of James Linton, and not his girlfriend. (Doc. 33; Tr. Evid. Hrg. at 37 and 45.) Yet on cross-examination, his bluffing is exposed to the court on this point, for his police reports revealed that he referred to Ms. Gail Gant-Linton as Mr. Linton's girlfriend, not as his wife. *Id.* at 46.

His observations about Ms. Linton's demeanor and physical condition are also interesting. His answers are guarded. He doesn't recall seeing or hearing her vomiting in the washroom, and doesn't recall whether she was pregnant, but then tellingly reveals that "she might have been." *Id.* at 49.

Much ado was made at the suppression hearing of how Officer Lindsay didn't really arrest Mr. Linton in the dwelling, *id.* at 14, but only after he was identified by Oden Ferriez, *id.* at 33. Officer Hartert had a different impression. He along with Officer Lindsay was one of the entry officers. (Doc. 33; Tr. Evid. Hrg. at 36). Officer Hartert, concluded not only in his report, filled out when the events were fresh in his mind, but also conceded on cross-examination that Mr. Linton was placed under arrest in the home in light of the handcuffs placed upon him. *Id.* at 56 and 57. Thus, putting Officer Lindsay's account of the events in serious doubt.

At some point in time, Officer Hartert also accompanied an Officer Sullivan while this officer, along with a canine named Fax, rummaged through the bedrooms and the apartment in general. Mrs. Linton was never asked if Officer Sullivan had her permission and consent to enter the dwelling with the dog, Fax. *Id.* at 51. This pooch apparently sniffed out a shoe box with a large quantity of money. (Doc. 33; Tr. Evid. Hrg. at 51-52). This box containing the money was seized along with what appeared to be "drug transaction pieces of paper" as well as another bag with a large amount of money in it. *Id.* at 52.

Again on cross-examination, Officer Hartert tries to bluff his way out of a tough corner. This time the question involved whether he personally observed Officer Arndt open up a large cabinet and look inside of it. At first, Officer

Hartert says he did not see Officer Arndt open this cabinet. Yet the account given in his police report is different. In this account, which he describes on cross-examination, "P.O. David Arndt began searching the kitchen. As he opened up a large cabinet, he saw eight large chunks of a white-yellow substance which he believed to be cocaine base". Officer Hartert weasels another explanation, "I don't know if the cabinet was opened, locked, left open. *I know that he had to open it to some portion*, as he related to me." (Emphasis Added). *Id.* at 58.

Sargent Thomas Doehling's account

The last police officer called to testify by the government was Sargent Thomas Doehling. A twenty one year veteran of the Milwaukee Police Department, he was called to the upper flat at 2810A North 15th Street on August 5, 1993 to "supervise officers that were on the scene regarding an arrest and recovery of property." *Id.* at 63 and 69. There were nine officers present at this scene. *Id.* at 69. He arrived approximately 1 hour and 45 minutes after the initial police contact with the residence and its occupants. (Doc. 33; Tr. Evid. Hrg. at 66). At the residence, he had contact with Gail Gant-Linton who identified herself, and indicated that she was the wife of James Linton. According to Sargent Doehling, he asked Ms. Linton if the police could have permission to search the dwelling, and she said that would be alright. *Id.* at 65. Then he entered a statement in his memo book, "I live at and pay rent at 2710A North 15th Street. I give permission for the Milwaukee Police Department to conduct a search of my residence." He then claims he read these two statements to her, gave her the memo book and asked her to sign below the entry. *Id.* at 65.

Sargent Doehling's account of events is troubling. This one officer is called to supervise an operation that is completed. After all, the search had been conducted and items of evidence recovered and seized. *Id.* at 70. Although Sergeant Doehling acknowledges all the many officers on the scene were "competent and capable enough to obtain a written consent to search the dwelling", *id.* at 66, yet, he is the one who actually attempts to obtain the written consent over an hour and 45 minutes after the police entry into the flat, and after the search is completed and evidence seized. *Id.* at 70.

Sergeant Doehling doesn't venture anything but a vague explanation of the method and manner of his act of obtaining Ms. Linton's signature on an entry in a memo book. There is no confirmation that he engaged in any effort to see if she understood what she was signing, and if she was doing so freely and voluntarily.

Detective Dale Jackson's account

Detective Dale Jackson was called by the defense to demonstrate that the police effort to establish probable cause for this warrantless home arrest of James Linton only occurred after the arrest of Mr. Linton and his removal from the area. Moreover, Detective Jackson uncovered information which cast doubt on Mr. Ferriez's reputation as a law abiding citizen, and his character for truthfulness. Although Mr. Linton had long been in police custody, when Detective Jackson was called to the scene, it was this police officer's mission to seek information corroborating Mr. Ferriez's claim of shotgun play on the part of Mr. Linton. (Doc. 33; Tr. Evid. Hrg. at 76 and 77).

Detective Jackson learned among other things that Oden Ferriez related to another citizen named Scott that Mr.

Ferriez had been caught tampering with a Corvette earlier in the evening. Mr. Ferriez had related that a shotgun was involved, but the only shells which Detective Jackson recovered were shells from a 9 millimeter. No shotgun shells were recovered. Additionally, Mr. Scott gave a conflicting account of the events. He advised police that the persons involved "were reaching for a handgun." *Id.* at 80. On the other hand, Mr. Ferriez claimed that a three and one half foot long shotgun was used. *Id.* No mention is made that any shotgun was ever recovered in regard to Detective Dale Jackson's investigation, or for that matter, in the work done by other police officers on this case.

Finally, in the course of Detective Jackson's investigation, he also learned that a Corvette was registered to a relative of Mr. Linton. (Doc. 33; Tr. Evid. Hrg. at 80, 81 and 83). This demonstrates that Mr. Ferriez would have a motive to make a false report in order to stave off any claim by the Lintons that he had attempted to steal a car. *Id.* at 80.

B. The Lintons' Testimony Regarding The Entry, Arrest And Search.

Gail Gant Linton's account

Ms. Linton was called by the defense. Her testimony demonstrated that armed police officers barged into the dwelling knocking her against the wall of the hallway. *Id.* at 90-91. No permission to enter the dwelling was requested by the police. *Id.* at 91. Police never asked for permission to search. *Id.* They conducted a full blown search, opening kitchen cabinets, rummaging through bedrooms, looking under couches with flashlights. All of this being conducted without either consent, express or implied. *Id.* at 92-94. At one point, Ms. Linton was vomiting

in a bathroom of the residence. *Id.* at 93. Ms. Linton was pregnant at the time. (see Affidavit of Attorney Hunt in support of his request for Extension of Time; Doc. 14). She was told to sign a form indicating consent, but only after the police had completed the search and seizure. *Id.* at 95, 107.

She observed the police with guns drawn. She recalled one of the police officers had a shotgun. *Id.* at 108. During the entire event, she was scared, nervous and sick. *Id.* at 108-109. As to the form she was told to sign, she felt as if she had no choice but to sign it. (Doc. 33; Tr. Evid. Hrg. at 107, 109).

James Linton's account

Mr. Linton was the last witness called to present evidence at the hearing. Mr. Linton was quite clear and emphatic on both direct and cross-examination. He never gave permission or consent to the police to enter and search his residence that night. *Id.* at 110. He recalled, however, that Officer Lindsay did ask him for permission to search. *Id.* at 110. When asked by Officer Lindsay if he could search the residence, his answer was clear and unmistakable, "NO". *Id.* He added, "I do not own a shotgun and you cannot search the house". *Id.* at 112.

REASONS FOR ALLOWANCE OF THE WRIT

There are two principle reasons to grant a writ of certiorari in this case. First, the decision of the United States Court of Appeals for the Seventh Circuit simply relied on the lower court's findings of fact in crediting the testimony of police officers over the testimony of the peti-

tioner and his wife. In issuing an unpublished decision in the form of a summary order without any discussion of the conflicts in testimony between the police officers and the citizen witnesses on the issue of consent to search, the United States Court of Appeals failed to follow this court's precedent in *Anderson v. City of Bessemer*, 470 U.S. 564 (1985). In *Anderson*, this court recognized that when a lower court's findings are internally inconsistent or contradict extrinsic evidence a reviewing court could find clear error and disregard the lower court's factual findings. *Id.* at 573.

Such is the case here. The United States Court of Appeals could have easily concluded that the police were not to be believed here. The Court of Appeals did not. The petitioner is confident that this Court will so conclude.

The second principle reason for allowing the writ is based on the absence of any mention in the Court of Appeals decision of the weighing process necessary to determine whether consent to search is valid. In this Court's decision in *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 229 (1973), courts are directed to consider in evaluating the validity of a consent, under a totality of circumstances analysis, the nature of the police questioning, the environment in which the questioning took place, the possibly vulnerable subjective state of the person consenting, and the consenting party's knowledge of the right to refuse. No such analysis is contained in the Court of Appeals decision.

In particular, this Court should allow the writ to establish in case law a bright line rule that purported consents, obtained after a warrantless police entry, search and seizure are conducted, are inherently invalid. This would be a proper exercise of this Court's supervisory function in establishing a precedent which would guide all courts in analyzing the question of when a consent is valid. The

standards set forth in *Schneckloth* would thereby be clarified. Such a precedent would provide lower courts with much needed guidance in making a determination of the validity of consent in such settings.

One respected commentator has recognized:

> Unquestionably, if evidence is uncovered in an illegal search and the defendant is 'face to face with the incriminating evidence and able to see that the police had firm control over her home,' a consent to police seizure is not voluntary. The same is true if the police in the course of an illegal search find certain incriminating evidence and then obtain the permission of the person in charge of the place searched to search the balance of that place. The purported consent given in such circumstances is nothing more than 'submission or resignation to police authority,' for the individual most likely 'erroneously believed that it was useless to resist.'

W. LaFave, III *Search and Seizure*, Section 8.2(d) at 194-195 (2nd ed. 1987).

The phrase "I give permission for the Milwaukee Police Department to conduct a search of my residence", (Doc. 33; Tr. Evid. Hrg. at 72), should not be enough to satisfy any court that this purported consent was freely, voluntarily and knowingly given. This is especially so when one considers that the search and seizure was completed when Sergeant Doehling became involved. So what if Ms. Linton's signature is placed below an entry in a police memo book. After the constitutional violation has occurred, this can't be said to be valid consent in any event.

Moreover, is it believable or logical that the handcuffed, in custody, Mr. Linton would consent to an entry and search voluntarily and freely when the fruits of the warrantless search would surely lead to his incarceration?

"Where the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority." *Florida v. Royer*, 460 U.S. 491, 497 (1983).

Both the United States Court of Appeals decision and the District Court decision seem to be in conflict with the above quoted language from the *Royer* decision. And so, this Court should allow the writ so that these principles of fourth amendment law are carved in a bright line rule so that lower courts know that these precepts are not to be ignored.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari to the United States Court of Appeals for Seventh Circuit should be granted.

Respectfully submitted,

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APPENDIX

[UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued October 12, 1994

October 20, 1994.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 94-2061 v.

JAMES S. LINTON,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 93-CR-137—Thomas J. Curran, *Judge.*

ORDER

James S. Linton unsuccessfully moved to suppress evidence seized by officers of the Milwaukee, Wisconsin Police Department during a search of his apartment. Linton

entered a conditional plea of guilty to possession with intent to distribute cocaine base in violation of 21 U.S.C. § 841(a)(1), and was sentenced to 140 months' imprisonment. Linton reserved the right to appeal the denial of his pretrial suppression motions. *See* Fed. R. Crim. P. 11(a)(2). We affirm.

The police officers conducted a lawful *Terry* investigative stop when they handcuffed Linton for the limited purpose of confirming Linton's identity as the person involved in a shooting offense. *See United States v. Tilmon*, 19 F.3d 1221, 1224 & 1228 n.4 (7th Cir. 1994); *United States v. Smith*, 3 F.3d 1088, 1094 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 733 (1994); *United States v. Wilson*, 2 F.3d 226, 231 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1615 (1994); *Tom v. Voida*, 963 F.2d 952, 957-58 (7th Cir. 1992); *United States v. Glenna*, 878 F.2d 967, 972 (7th Cir. 1989). Linton and his wife voluntarily consented to the warrantless search of the apartment, which resulted in the seizure of cocaine base, materials for packaging and manufacturing cocaine, and $20,391 in cash. *See United States v. Evans*, 27 F.3d 1219, 1230-31 (7th Cir. 1994); *United States v. Betts*, 16 F.3d 748, 753 (7th Cir. 1994); *United States v. White*, 979 F.2d 539, 542 (7th Cir. 1992). That the magistrate judge chose to credit the police officers' testimony over the Lintons' testimony regarding the consensual nature of the search is a matter to which we, as an appellate court, must defer. *E.g. United States v. Wesson*, 1994 WL 459258, *7 (7th Cir. Aug. 25, 1994); *United States v. Matthews*, 1994 WL 417302, *2 (7th Cir. Aug. 10, 1994). The district court's denial of the motions to suppress was not clearly erroneous. *E.g. United States v. Scott*, 19 F.3d 1238, 1242 (7th Cir. 1994). We accordingly AFFIRM the decision of the district court for the reasons stated in the attached report and recommendation and order.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES S. LINTON,

Defendant.

Case No. 93-Cr-137

MAGISTRATE JUDGE'S RECOMMENDATION
RE: DEFENDANT LINTON'S
MOTION TO SUPPRESS EVIDENCE

NATURE OF CASE

On September 30, 1993 this Court issued its recommendation and order regarding a number of pretrial motions filed by defendant Linton. Remaining for decision is defendant Linton's motion to suppress evidence which was the subject of an evidentiary hearing conducted by the Court on October 5, 1993. The motion is now ready for resolution and will be addressed herein.

MOTION TO SUPPRESS

Defendant Linton moves the Court for issuance of an order suppressing the "fruits" of his unlawful warrantless arrest on August 5, 1993 at his residence located at 2710A

North 15th Street, Milwaukee, Wisconsin. As grounds for his motion, he asserts that: no exigency existed for the warrantless entry to his home and his subsequent arrest; arresting officers did not have probable cause to believe he had committed a felony; and arresting officers did not obtain entry to his home by an effective, voluntary, consent. At the evidentiary hearing, City of Milwaukee Police Department (hereinafter referred to as MPD) Officers Ronald Lindsay, Mike Hartert, Thomas Doehling, and Detective Dale Jackson appeared and testified on behalf of the government. The defendant and his wife, Gail Gant-Linton testified on his behalf. Based on the testimony and evidence adduced at the evidentiary hearing and the uncontested facts, as well as having considered the briefs and arguments of the parties, this Court now makes its findings of fact and proposed disposition of such motion.

Findings of Fact

On August 5, 1993, at approximately 12:11 a.m., MPD law enforcement officer Ronald Lindsay, a sixteen (16) year veteran assigned to the Tactical Unit, and his partner were dispatched to investigate a report of a shooting in the area of 2361 North 14th Street, Milwaukee, Wisconsin. Upon their arrival, they spoke to a citizen witness, Oden Ferriez, who claimed a man by the name of "Junior," later identified as defendant Linton, had fired a shotgun at him. Ferriez also described "Junior" and indicated he could show the law enforcement officers where the defendant resided. He led them to 2710A North 15th Street, Milwaukee, Wisconsin; the upper flat of a two (2) story duplex home located in a high crime neighborhood which is the site of frequent drug trafficking and firearms violations. At the duplex they were joined by approximately seven (7) other MPD officers.

There, Officer Lindsay, accompanied by three (3) other officers, proceeded up an exterior stairway to the second story flat and knocked on the door. After a "long time", a black female, later identified as the defendant's wife, Gail Gant-Linton, answered the door. She responded affirmatively to Officer Lindsay's inquiry whether "Junior" was on the premises and called for "Junior." The defendant then came to the door in his underwear and Officer Lindsay advised him that he was investigating an alleged shooting by a "Junior" and asked hm to step outside for identification by a witness. Defendant Linton admitted he was known as "Junior" and agreed to the identification procedure. Officer Lindsay also told the defendant he wanted to search the premises for weapons. The defendant indicated he had no guns and consented to a search of the flat. Meanwhile, Gant-Linton brought the defendant clothing which Officer Lindsay observed matched Ferriez' description.

Because of the nature of the investigation, Officer Lindsay placed the defendant in handcuffs before leading him outside to where Ferriez could identify him. At that time, Officer Lindsay specifically advised the defendant he was not under arrest and told him that, if Ferriez did not identify him, he would be free to go back to sleep. The defendant seemed anxious to get out of the apartment and may have made said "let's get this over with because I know I'm going to jail." However, Officer Lindsay responded, "No, you will not go to jail; you are not under arrest." Shortly after Officer Lindsay and the defendant went outside, Officer Lindsay's partner informed him that Ferriez had identified the defendant as the shooter. The defendant was then placed under arrest.

Meanwhile, MPD law enforcement officer Hartert was inside the flat speaking to Gant-Linton. She told him that

she and the defendant, her husband, resided there. Initially, Gant-Linton did not respond to Hartert's request for permission to look for the shotgun. However, when he stated that she would not want her young son to find the gun, Gant-Linton told him to go ahead and look around, gesturing toward the bedroom. During the period of nearly two (2) hours during which law enforcement officers were in the flat, the kitchen and living room were also searched, and a drug detection dog was utilized. At approximately 1:45 a.m., pursuant to standard MPD procedure directed towards eliminating claims of wrongdoing when the MPD acquires custody of significant amounts of property, Officer Doehling arrived at the flat to supervise the arrest and seizure of property. After he briefly interviewed Gant-Linton, ascertaining she paid the rent for the flat and had consented to the search of the premises by the MPD, Officer Doehling memorialized her consent in his memo book, where he wrote:

> I live at and pay rent at 2710A 15 St. I give permission for the Milwaukee Police Department to conduct a search of my residence.

(Copy attached hereto). Gant-Linton signed her name beneath the statement.

Both the defendant and his wife denied consenting to a search of their flat. Gant-Linton further testified she was sick to her stomach and vomited in the bathroom while officers were still present. She also testified the only statement in the officer's memo book when signed by her was, "I live at and pay the rent at 2710A 15 St."

Analysis

Legality of Seizure

The threshold issue in this case is whether Officer Lindsay and his fellow MPD officers acted appropriately in response to Ferriez' complaint.

The law is well established that an encounter between a law enforcement officer and a citizen implicates the Fourth Amendment only if the officer seizes the citizen. *United States v. Mendenhall*, 446 U.S. 544, 555 (1980); *Terry v. Ohio*, 392 U.S. 1, 19 (1968). If a seizure does not occur; and, therefore, the encounter is consensual in nature (limited to questioning about an individual's identity and requesting identification), then police do not need justification for this contact. *INS v. Delgado*, 466 U.S. 210, 216-17 (1984); *United States v. Dyer*, 784 F.2d 812, 815-16 (7th Cir. 1976); *United States v. Borys*, 766 F.2d 304, 310-11 (7th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986). The test for determining whether a police-citizen contact rises to the level of a Fourth Amendment seizure is an objective one. *United States v. Espinosa-Alvarez*, 839 F.2d 1201, 1205 (7th Cir. 1987); *United States v. Pavelski*, 789 F.2d 485 (7th Cir.), *cert. denied*, 479 U.S. 917 (1986). This formulation is whether, based on the totality of circumstances, a reasonable person would believe his freedom of movement is restrained or believes he is at liberty to disregard a police officer's request for information. If the latter, then a seizure has not occurred. *United States v. Espinosa-Alvarez*, 839 F.2d at 1205.

In order to assess the reasonableness of the seizure, this Court must weigh the circumstances on the Fourth Amendment "scale" for police/citizen encounters. *See United States v. Chaidez*, 919 F.2d 1193, 1197 (7th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 209 (1991). "[A]

person has been 'seized' within the meaning of the Fourth Amendment . . . . only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (citations omitted). Recently the Court of Appeals for this Circuit summarized the three (3) categories for police/citizen encounters in relation to the Fourth Amendment as follows:

> The first category is an arrest, for which the Fourth Amendment requires that police have probable cause to believe a person has committed or is committing a crime. *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964). The second category is an investigatory stop, which is limited to a brief, non-intrusive detention. This is also a Fourth Amendment "seizure", but the officer need only have specific and articulable facts sufficient to give rise to a reasonable suspicion that a person has committed or is committing a crime. *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82, 95 S.Ct. 2574, 2580-81, 45 L.Ed.2d 607 (1975); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The third category involves no restraint on the citizen's liberty, and is characterized by an officer seeking the citizen's voluntary cooperation through non-coercive questioning. This is not a seizure within the meaning of the Fourth Amendment. *United States v. Mendenhall*, 446 U.S. 544, 553-55, 100 S.Ct. 1870, 1876-77, 64 L.Ed.2d 497 (1980); *Terry*, 392 U.S. at 19, n.16, 88 S.Ct. at 1879, n.16.

United States v. Johnson, 910 F.2d 1506, 1508 (7th Cir. 1990), *cert. denied*, 489 U.S. 1051 (1991). *See also, United States v. Adebayo*, 985 F.2d 1333, 1337-38 (7th Cir.), *cert. denied*, ____ U.S. ____, 113 S.Ct. 2947 (1993). "So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required." *United States v. Williams*, 945 F.2d 192, 195 (7th Cir. 1991). "A

person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Withers*, 972 F.2d 837, 841 (7th Cir. 1992) (citations omitted).

The distinction between a consensual encounter and a stop is one of degree. Relevant factors include whether the encounter occurred in a public or private place, whether the suspect consented or refused to talk to the police, whether the police informed the suspect that he was not under arrest and was free to leave, whether the police removed the suspect to another area, whether the suspect felt capable of refusing to consent to the search, and whether the suspect eventually departs the area without hindrance. *See United States v. Withers*, 972 F.2d at 842. Other factors in this determination include: "The threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or the tone of voice indicating that compliance with the officer's request might be compelled." *United States v. Withers*, 972 F.2d at 842 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554-55 [1980]). Additionally, the "lengthy" retention of documents, such as identification and airline tickets, is a factor in determining whether a stop occurred. *See United States v. Withers*, 972 F.2d at 842.

Here, the encounter began when Officer Lindsay knocked on the door to the defendant's apartment, and was consensual. *See United States v. Withers*, 972 F.2d at 841. This action was an appropriate and necessary part of the investigation of the report of a citizen complaint. Gant-Linton voluntarily answered Officer Lindsay's brief inquiry and summoned "Junior" to come to the door. Simi-

larly, the defendant willingly responded to Officer Lindsay's inquiry as to his identity, agreed to the proposed identification procedure, and consented to a search of the flat. Only after Officer Lindsay ascertained that defendant Linton matched Ferriez' description of the shooter, and defendant Linton had admitted being known as "Junior" and had agreed to the identification procedure, was he handcuffed by Officer Lindsay.

At that time, defendant Linton became the subject of an investigatory stop. The use of handcuffs did not automatically transform the stop into an arrest. *See United States v. Wilson*, 2 F.2d 226, 231-32 (7th Cir. 1993); *United States v. Glenna*, 878 F.2d 967, 972 (7th Cir. 1989). Although the court in *Glenna* observed that the thought of allowing police to handcuff persons when probable cause to arrest is lacking is a troubling one, nevertheless, it held that, if in a rare case, "common sense and ordinary human experience" convince us that an officer reasonably believes that an investigative stop could be effectuated only in this manner, "we will not substitute our judgment for the officers as to the best methods to investigate." *United States v. Glenna*, 878 F.2d at 972 (citations omitted). Given the circumstances of this case where the defendant and Officer Lindsay had to proceed outside by descending a narrow exterior stairway from the flat, it was entirely reasonable for the officer to handcuff the defendant for his own protection. *See United States v. Wilson*, 2 F.3d at 231-232.

Additionally, this Court concludes that, at the time Officer Lindsay handcuffed the defendant, he had knowledge of "specific and articulable facts which, taken together with the rational inferences from those facts" which could reasonably cause him to conclude in light of his experience that criminal activity was afoot. *Terry v. Ohio*, 392 U.S.

1, 21 & 30 (1968); *Alabama v. White*, 496 U.S. 325, 329-30 (1990). "Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability." *Alabama v. White*, 496 U.S. at 330. In this instance, the alleged victim of the shooting informed law enforcement officers that "Junior" had fired a shotgun at him, provided a description of "Junior's" clothing, and indicated he could show law enforcement officers where "Junior" lived. Ferriez was more than an anonymous informant. He had firsthand knowledge of the alleged incident and was willing to stand behind the information he provided to the law enforcement officers by submitting to a personal interview with them and confronting the defendant in an identification procedure. Ferriez also directed the law enforcement officers to "Junior's" residence. These actions by Ferriez evinced his reliability. Furthermore, the reliability of the information was enhanced by the fact that the incident, as described by Ferriez, occurred within a neighborhood reputed to be the site of frequent shootings. Thus, this Court concludes that, when Officer Lindsay handcuffed the defendant, he was appropriately conducting an investigatory stop. Finally, after the defendant was positively identified by Ferriez as the shooter, probable cause existed to believe defendant Linton had committed a crime and an arrest was appropriate.

Consent to Search

"A warrantless search pursuant to consent which is 'freely and voluntarily given' does not violate the Fourth Amendment." *United States v. Rice*, 995 F.2d 719, 723 (7th Cir. 1993) (citations omitted). "Whether a consent was voluntary, as opposed to the product of duress or coercion, is a question of fact to be determined from the total-

ity of the circumstances." *United States v. Rice*, 995 F.2d at 723 (citation omitted). The government must prove the consent was voluntary by a preponderance of the evidence. *United States v. Rice*, 995 F.2d at 724.

In this instance both the defendant and his wife consented to the search of the apartment. Although defendant Linton denies he consented to the search, nevertheless this Court finds that his self serving testimony is not credible when weighed against Officer Lindsay's testimony that the consent was given. Likewise, this Court concludes the defendant's wife, Gant-Linton, consented to a search of the flat. A search upon the consent of the third party whom the officers at the time of the search reasonably believe has common authority over the premises does not violate the Fourth Amendment. *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990). Gant-Linton's testimony that she did not consent to a search of the flat is not credible when weighed against the conflicting testimony of Officer Hartert and the record of that consent in Officer Doehling's memo book. The scenario that she did not approve the entire statement, including the fact that she gave permission to search the residence, totally lacking in credence. Similarly, to the extent she implies that her consent was involuntary because she was ill while officers were searching, this Court finds such testimony to be incredible. From the photographs of the flat introduced into evidence at the hearing, it is apparent the flat was small and the sound of vomiting in the bathroom would not have gone unnoticed by law enforcement officers.

Finally, this Court concludes Gant-Linton's consent was not coerced. Any encounter between law enforcement officers and citizens in which the citizen is aware of the officers' identity will involve some degree of "subtle coercion." *United States v. Rice*, 995 F.2d at 724. Gant-Linton

was not subjected to harsh interrogation. She was not overwhelmed with the physical presence of law enforcement officers. Although one (1) or two (2) officers apparently displayed weapons when they knocked on the door to the flat, the weapons were promptly holstered. There is no evidence that Gant-Linton was physically touched by any of the officers. Although the incident occurred during the night and Gant-Linton was never told she could refuse to consent to the search, these factors in and of themselves, do not render her consent involuntary. Moreover, even if this Court were to conclude that Gant-Linton did not voluntarily consent to a search of the flat, the validity of her consent is not dispositive of the suppression issue, since law enforcement officers had secured the defendant's own consent to a search of the premises.

Summation

In sum, this Court concludes there is no basis for suppression of evidence in this case. Law enforcement officers carried out a proper investigatory stop supported by reasonable suspicion which led to probable cause for the defendant's arrest. They concluded a warrantless search of the defendant's home, pursuant to the knowing and voluntary consent of the defendant and his wife.

CONCLUSION

NOW THEREFORE, IT IS HEREBY RECOMMENDED that the United States District Judge enter an order DENYING defendant Linton's motion to suppress fruits of unlawful arrest.

Your attention is directed to 28 U.S.C. § 636(b)(1)(B) and (C) and Local Rule 13.03 (E.D. Wis.), whereby written objections to the foregoing recommendation may be filed

in duplicate with the Clerk of Court within ten (10) days hereof. Failure to file a timely objection shall result in a waiver to your right to appeal.

Dated at Milwaukee, Wisconsin this 19th day of November, 1993.

BY THE COURT:

/s/ Robert L. Bittner
United States Magistrate Judge

[Filed January 5, 1994]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 93-CR-137

JAMES S. LINTON,

Defendant.

ORDER

I. PRETRIAL MOTIONS

On September 30, 1993, Magistrate Judge Robert Bittner issued a memorandum recommending that the court deny Defendant James Linton's motion to dismiss the indictment. Defendant Linton filed a timely objection to the Magistrate Judge's findings of fact and conclusions of law. These issues have now been fully briefed and, having reviewed the record *de novo*, the court adopts the findings of fact and conclusions of law set forth by Magistrate Judge Bittner and incorporates them herein by reference. Based upon these findings and conclusions, the court ORDERS that Linton's motion to dismiss the indictment for unconstitutional grand jury and petit jury selection IS DENIED.

IT IS FURTHER ORDERED that the orders issued by Magistrate Judge Bittner in his September 30, 1993, Recommendation and Order ARE AFFIRMED.

II. SUPPRESSION ISSUES

On November 19, 1993, Magistrate Judge Bittner issued a second pretrial memorandum recommending that Linton's motion to suppress be denied. This recommendation was issued following an evidentiary hearing held on October 5, 1993. Linton again objected to the factual and legal bases for this recommendation. The issues Linton raised have now been briefed and the court has conducted a *de novo* review of the record as a whole, including a transcript of the suppression hearing.

First, Linton objects to the credibility findings made by Magistrate Judge Bittner in deciding whether Milwaukee police officers obtained a valid consent to conduct a warrantless search of Defendant Linton's apartment. At the hearing, Officer Ronald Lindsay testified that Defendant Linton himself consented to the search. In addition, fellow Officer Michael Hartert testified that Linton's wife Gale separately consented to the search. Gale also signed a written consent form after the search was underway.

At the hearing, both James and Gale denied giving consent, but the Magistrate Judge chose to believe the police officers. Despite some minor inconsistencies and memory lapses cited by the Defendant, the officers' accounts were not markedly illogical or inconsistent or otherwise unbelievable. The officers' accounts were corroborated by their contemporaneous notes and the signed consent form. Having read the testimony, this court does not find that the testimony of the officers was so implausible or suspicious as to render the Magistrate Judge's credibility rulings clearly erroneous. *See United States v. Hardin*, 710 F.2d 1231, 1236 (7th Cir.), *cert. denied*, 464 U.S. 918 (1983). Consequently, the court finds that the Lintons gave the Milwaukee police valid consent for a warrantless

search of their home and the court will not suppress any of the evidence gathered during the search.

The second issue raised at the suppression hearing was whether the fruits of what Linton calls his illegal "arrest" must be suppressed. The record shows that at approximately 12:11 A.M. on August 5, 1993, Milwaukee Police Officers arrived at the apartment of James Linton after a citizen had complained that a man he knew as "Junior" had been discharging a shotgun in his vicinity. Having gained admittance from Gale Linton, the officers ascertained from her that James Linton is known as "Junior." The police officers also observed a nearby car with windows damaged by gunshot and were shown clothing by Gale Linton similar to the suspect's clothing as identified by the complaining party. Based on these factors, the police handcuffed Linton so that he could be led outside for the witness to identify. The officers explained that they were in a high crime neighborhood after midnight and that, with a yet-to-be-found gun involved, they used handcuffs because they feared for their safety. After Linton was led outside, the complaining witness positively identified him as the shooter and Linton was then put under arrest.

Linton says that he was illegally put under arrest without probable cause as soon as the handcuffs were put on. The government, on the other hand, maintains that the time from the handcuffing to the arrest after identification was merely an investigatory "Terry" stop, *see Terry v. Ohio*, 392 U.S. 1, 21 & 30 (1968), which was justified by reasonable suspicion.

The Seventh Circuit has ruled that the use of handcuffs does not automatically transform an investigatory stop into an arrest. *See United States v. Wilson*, 2 F.2d 226,

231-32 (7th Cir. 1993); *United States v. Glenna*, 878 F.2d 967, 972 (7th Cir. 1989). Although handcuffing a suspect prior to establishing probable cause for an arrest is a practice to be avoided if at all possible, the court believes that in this case the facts fit within the parameters of the Seventh Circuit's decisions permitting handcuffing in narrow circumstances. The *Terry* stop in this case was merely a temporary measure employed to effectuate the identification by the witness. Once Linton was positively identified, probable cause existed and he was formally put under arrest. Because of the time of night, the high crime area, and the nature of the offense under investigation, the officer's response and concern for their own safety was reasonable and commensurate with the particular circumstances.

For these reasons the court hereby adopts the findings of fact and conclusions of law found in the Magistrate Judge's report of November 19, 1993, and incorporates them herein by reference. Based upon these findings and conclusions, the court ORDERS that Defendant James Linton's motion to suppress IS DENIED.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin this 5th day of January, 1994.

/s/ Thomas J. Curran
United States District Judge